Supreme Court, U.S.
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Case No. (1)

**IN THE SUPREME COURT OF THE UNITED STATES**

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WALTER L. WAGNER, LINDA M. WAGNER, DAN PERKINS, DAVID ADAMS,

Petitioners and Defendants

*vs.*

WORLD BOTANICAL GARDENS, INC., A Nevada Corporation,

Respondent and Plaintiff

---

On Petition for Writ of Certiorari of Nevada Supreme Court Case No. 48428 [Dist. Case. No. CV05-02079]

---

# PETITION FOR ISSUANCE OF A WRIT OF *CERTIORARI*

Petitioners:

LINDA M. WAGNER
WALTER L. WAGNER
DAN PERKINS
DAVID ADAMS
PO Box 881
Pepeekeo, HI 96783
808 964-5535

## QUESTIONS PRESENTED FOR REVIEW

1. Fifth Amendment Due Process Violation:

Does issuance of a trial award of attorney's fees against petitioner Dr. Walter L. Wagner by a Nevada court when petitioner Dr. Wagner merely appeared as a witness at the Trial in support of the named defendants, and who was not himself a party to the Trial violate his Fifth Amendment due process rights?

2. Fifth Amendment Due Process Violation:

Does issuance of a trial award of monetary damages against petitioner Dr. Wagner by a Nevada court when petitioner Dr. Wagner merely appeared as a witness at the Trial in support of defendants, and who was not himself a party to the Trial violate his Fifth Amendment due process rights?

3. Additional Due Process Violations

A. Would a person [petitioner Dr. Wagner herein] reasonably understand that weeding and pruning, as a volunteer effort and accepted and approved as such by botanical garden staff, would constitute an "interference with the business of the botanical garden" so as to constitute a contempt of court with a jail sentence imposed thereon?

B. May a Nevada trial court subsequently overrule a prior ruling by another Nevada trial court on the issue of corporate governance [with corporate governance previously affirmed for all Petitioners herein], but in a different County, and instead entertain as corporate counsel on behalf of plaintiff an old friend of the trial judge who was

hired in that different County in violation of the original court's ruling?

C. May a Nevada court find a party [Mr. Perkins herein] in civil contempt of court with lengthy jail time imposed, if the party was never notified by the court or by his attorney that he was being charged with contempt and accordingly never presented a defense?

D. May a Nevada court issue an award of monetary damages against defendants [all Petitioners herein] when they have previously entered into an agreement with the plaintiff that no monetary damages would be sought at Trial?

E. May a Nevada court issue an award of attorney's fees against defendants [all Petitioners herein] when they have

previously entered into an agreement with the plaintiff that no monetary damages would be sought at Trial, and the Nevada statutory law requires a finding of monetary damages in order to issue an award of attorney's fees?

F. May a Nevada statutory law that limits attorney's fees only to cases in which the monetary damage award is less than $20,000, constitutionally allow for attorney's fees of $75,000 if the monetary damage is kept just under $20,000? [pertains to all Petitioners herein]

G. Is it proper for a Nevada court to make a factual determination that a single individual's statements are true [Kenneth Francik's] when they are directly contradicted by four other

witnesses [Petitioners Dr. Wagner, Mrs. Wagner, Mr. Perkins, Mr. Adams] of superior character?

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[none cited]

## STATEMENT OF JURISDICTION

(i) Judgment Date: January 15, 2008;

(ii) Date of Rehearing: None;

(iii) Court Jurisdiction: Jurisdiction is conferred upon this Court by the Fifth Amendment to the US Constitution as applied to the various States via the Fourteenth Amendment;

## FIFTH AND FOURTEENTH AMENDMENTS

FIFTH AMENDMENT

> "*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,* ***nor be deprived of life, liberty, or property, without due process of law****; nor shall private property be taken for public use, without just compensation.*" [***bold*** added for emphasis]

FOURTEENTH AMENDMENT

> "*1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;* ***nor shall any State deprive any person of life, liberty, or property, without due process of law****; nor deny to any person within its jurisdiction the equal protection of the laws.*" [***bold*** added for emphasis] [See Appendix for full text of subsequent paragraphs of the Amendment.]

## STATEMENT OF CASE AND FACTS

A. Statement of Case:

Petitioners request that this Court grant their petition for issuance of a Writ of *Certiorari* herein, seeking review of erroneous decisions by the Nevada Supreme Court and the underlying Nevada trial court. Those erroneous decisions wrongly affirmed issuance of an award of attorney's fees and a

monetary judgment against a petitioner Dr. Wagner who was not a party to the Trial, but rather merely a witness at the Trial, as well as numerous other errors of law.

Petitioners Walter L. Wagner and Linda M. Wagner formed respondent World Botanical Gardens, Inc. [WBGI] as a corporation, initially as a Utah corporation in 1995, but with its business operations and headquarters in Hawaii, where petitioners Wagners live. In 2001, Petitioner Walter L. Wagner, as the incorporator filed new Articles of Incorporation in the name of WBGI, via an internet filing in the State of Nevada, and the Nevada corporation acquired all of the rights, liabilities and obligations of the former Utah corporation, which was dissolved. Petitioner Dr. Wagner was named as the sole Director of the corporation, and Dr. and Mrs. Wagner were the sole officers.

Thereafter, the individual respondent agents [Kenneth Francik et al.], minority shareholders in WBGI, falsely guising themselves as WBGI, fraudulently sought and obtained a change in the records of the Secretary of State naming themselves as the proper officers, and deleting the petitioners Wagners herein as the officers of WBGI.

In August, 2005 WBGI filed suit in Las Vegas, Nevada against one Ms. Josie Perkins, a resident of Nevada who had been making false claims in Nevada that she was the proper President of the corporation, seeking *inter alia* a determination as to the proper parties who were in governance of WBGI. In that suit, which was filed August 18, 2005 entitled *WBGI v. Perkins*, Civil No. A508735, the honorable Kenneth C. Cory, a judge in Las Vegas [Clark County], Nevada ruled on September 8, 2005 that the petitioners herein were properly the governing body of WBGI,

basing his decision on the Nevada *Articles of Incorporation*, the then current records of the Nevada Secretary of State, etc., stating on September 8, 2005:

> "... *the Court finds that World Botanical Gardens, Inc. is incorporated in the State of Nevada, its designated officers are Walter L. Wagner, President, and Linda M. Wagner, Secretary/Treasurer, and its designated Board of Directors are Ronald Tolman, Chairman, Jacque Tolman, Walter L. Wagner, Linda M. Wagner, Dan Perkins, David Adams, Jim McBeth, Kim Harris, Doug Hansen, and Lanny Neel.* ..." [*underlining* added for emphasis]

One month later, on September 13, 2005 with their "complaint", and again on October 7, 2005 via an amended complaint, Mr. Robert Story, falsely guising himself as WBGI's attorney and his clients as "WBGI", initiated the instant action in Reno, Nevada, even though aware of the Las Vegas action that had already ruled that the Petitioners herein were the

proper governing body of WBGI. In the instant action, Mr. Story and his clients[1] sought to "overrule" the prior Las Vegas decision by way of its action it filed in Reno, and additionally made fraudulent claims[2] for monetary damages against the governing board of directors of WBGI, namely the petitioners herein.

It is this fraudulent claim for monetary damages that gives rise to the primary issue brought before this Court. During the course of the Nevada proceedings and well prior to Trial, respondent attorney Bob Story filed a motion for summary judgment against petitioner Dr. Wagner, which

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[1] Throughout the pleadings on file herein, the clients with whom Mr. Story conferred were primarily Mr. Kenneth Francik and Mr. Preston Michie, and who are the parties who financed Mr. Story to file suit to claim that they were the proper governing board of directors of WBGI.

[2] The claims were fraudulent, but believed as true by the trial court. Subsequently, Kenneth Francik confessed to the falsity of the claims in a different civil action more than one year after the trial. Currently pending is a criminal investigation by the Hawaii County prosecuting attorney's office into Francik's fraud in Hawaii.

motion was granted without an award of attorney's fees or monetary damages, effectively removing Dr. Wagner as a party to the action. An appeal of that summary judgment was not taken.

A perfunctory Preliminary Injunction hearing was also held on very short notice prior to Trial, with Dr. Wagner and Mr. Tolman, two of the proper officers and directors of the corporation [Board Chairman and President], appearing in person without their Hawaii counsel. At the conclusion of the short hearing thereon, the trial court erroneously overruled the prior order of the honorable Kenneth C. Cory in Clark County, and ruled that the respondent agents [Kenneth Francik et al.] constituted the proper board of directors of WBGI, granting their request for preliminary injunctive relief to preclude the petitioners from conducting then-forthcoming

elections, and allowing respondents' agents to conduct same instead.

Thereafter, the trial court [the honorable Brent Adams] calendared a Trial on the governance issue for the remaining petitioners who had not been discharged by summary judgment and who still remained in the case ["**remaining defendants**"[3]], to be heard concurrently with an OSC Hearing he had earlier calendared for petitioner Dr. Wagner, based on a falsely alleged claim that Dr. Wagner had violated the preliminary injunction, etc.

On August 11, 2006 respondents' agents filed their Trial Statement, and on August 15, 2006 they filed a motion *in limine* seeking *inter alia* that

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[3] Petitioners Mrs. Linda Wagner, Mr. David Adams and Mr. Dan Perkins; with the other named board-member defendants electing to accept offers of settlement also removing them from the case along with Dr. Wagner's removal from the case by the granting of the summary judgment motion against him only. Those petitioners are referred to as "**remaining defendants**" by the honorable Brent Adams.

petitioner Dr. Wagner not be allowed in the courtroom during the Trial, in that he was no longer a party to the action due to his prior dismissal from the suit by way of the summary judgment motion against him that had been granted.

This request to exclude appellant Dr. Wagner from the courtroom during the conduct of the Trial was likewise amplified upon during the very opening statement at Trial by respondents' attorney, Bob Story. This oral statement is very compelling evidence, and reads verbatim from the trial transcript as follows:

> "THE COURT: This is the time set for trial in case CR05-02079.
>
> Counsel, I have reviewed the file in this case, and the parties' trial statement, so I think we can dispense with opening arguments. I note from the plaintiff's trial statements that we have two witnesses with limited availability this morning, so you may proceed.

MR. STORY: Thank you, your Honor. Before we launch into our direct examination, there are a couple of preliminary issues I'd like to address with the Court, first of which is I'd like to exclude witnesses to, and including Walter Wagner, who's no longer a party in this case.

THE COURT: That was mentioned in the trial statement. It is true that the order granting partial summary judgment was entered in the case. The preliminary injunction was entered in the case, and a permanent injunction was entered in the case. Based on the prior hearing, evidentiary hearing the Court conducted, but you've argued that Mr. [*sic*] Wagner should be excluded during the proceeding because he's no longer a party. Why is it that he is no longer a party?

MR. STORY: Because he has been dismissed from the case, your Honor. He was - - our request was for preliminary injunction to - -

THE COURT: Right.

MR. STORY: - - and a permanent injunction to enjoin Mr. [*sic*] Wagner and his shadow board from interfering with the appropriate business affairs of the corporation.

THE COURT: Right.

MR. STORY: We've gotten the relief we seek and **we've stipulated that we're not seeking any damage claim against anyone** other than Mr. [*sic*] Hansen, so Mr. [*sic*] Wagner's no longer a party.

THE COURT: Okay. Ms. Hearne.

MS. HEARNE: Your Honor, we are hearing today [an] order to show cause [OSC] in which Dr. Wagner, particularly, is the party who is named and because these cases have been joined, he continues to be a party for that purpose. When - -

THE COURT: That's true. All right. The request to exclude him is denied. However, I am mindful of the conduct that Mr. [*sic*] Wagner was referenced in the pleadings in this case, so Mr. [*sic*] Wagner, I want to instruct you very specifically you are not to coach any witnesses during this proceeding, your are not to interfere in any way, and if you do you'll be subject to a sanction.

You may proceed.

MR. LARSEN: Thank you, your Honor. I'd like to call Mark

> Robinson to the stand. ... " [underlining and **bold** added for emphasis]

It is very clear that Mr. Story was referring to that stipulation between the parties to only seek monetary claims in Hawaii, and the order of the Hawaii court to that effect, when he stated "we've stipulated that we're not seeking any damage claim ..."

Dr. Hansen is no longer a party herein, having entered into a separate settlement removing him from the underlying appeal to the Nevada Supreme Court.

Dr. Wagner appeared solely as a witness at the Trial, and was not a defendant at the Trial, and presented no defense to any claims for monetary damages, in that he had been dismissed from the case by way of the prior summary judgment against him on the governance issue, and by way of the stipulation

between the parties that no monetary claims would be sought in the Nevada lawsuit.

At the OSC Hearing, Dr. Wagner appeared both as a witness, and as a named defendant wrongfully charged with civil contempt for allegedly violating a preliminary injunction.

After the Trial, the honorable Brent Adams erroneously issued a monetary judgment against Dr. Wagner, naming him as a Trial defendant subject to monetary damages, and issued an award of attorney's fees against Dr. Wagner stemming from that award of monetary damages against him at the Trial. No prior settlement offer had been made to Dr. Wagner [because he had been dismissed from the case by way of that summary judgment motion before settlement offers were made to the remaining defendants], a

Nevada statutory condition[4] prerequisite to issuance of an award of attorney's fees.

The trial judge additionally entered an order on the OSC Hearing he had conducted concurrent to the Trial, erroneously finding petitioners Dr. Wagner and Mr. Perkins to have been in contempt of court for allegedly violating his preliminary injunction.

Petitioners timely filed an appeal of all orders stemming from the Trial and the concurrent OSC Hearing issued by the honorable Brent Adams, which was thereafter heard by the Nevada Supreme Court.

Thereafter, respondents' agents filed various motions seeking to amplify upon the original monetary damage awards, and petitioners filed oppositions thereto, and these were incorporated as part of the appeal by way of the Nevada Supreme Court's order

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[4] Nevada Revised Statutes section 17.115(4)(d); Nevada Revised Statutes section 18.010(a)

directing response to the issues raised by both the emergency motion seeking a stay of a Sheriff's Sale, as well as the issues raised by the petitioners' civil proper person appeal statements.

The Nevada Supreme Court erroneously affirmed all orders of the lower court, without commenting on the issues raised by petitioners.

B. Statement of Facts:

WBGI as a corporate business entity was created by petitioner Dr. Walter L. Wagner [the Founder], and his wife petitioner Linda M. Wagner in 1995. Starting with approximately 300 acres of leased former sugar-cane field on Hawaii Island, over the course of nearly a decade Dr. Wagner, with the assistance of various WBGI employees, cleared and planted large portions of the land, developing a botanical gardens with a new roadway leading to a waterfalls overlook discovered by Dr. Wagner, and

converted the lease-hold land into fee-simple ownership by WBGI.

To fund this development initially, before there was any significant degree of tourist flow to the very new botanical gardens to provide development capital, investors were sought for the holding company, namely World Botanical Gardens Joint Venture Partnership ["Partnership"], which in turn then provided those funds to the corporation [WBGI]. The original idea was that the Partnership would initiate the development of and own numerous self-supporting corporations, including WBGI, though the second botanical garden corporation has yet to be initiated by the Partnership.

Due to the large amount of expense associated with development of the botanical gardens, Dr. Wagner personally loaned approximately $520,000 to WBGI which was a long-term indebtedness of WBGI.

A few of the later investors in the Partnership, namely Kenneth Francik [who invested a small sum of roughly $60,000 circa 1999] and the others of his board, purportedly grew impatient with the progress of the development of the Visitor Center after 9/11/2001 drastically impacted WBGI, and made promises and assurances to the Founders [who were also the corporate officers and Director] that if Francik and his associates were provided control of the company bank account, they would be able to bring in additional capital and move the project forward at a more rapid pace.

Accordingly, the Partnership held elections in late 2003 to develop a board of directors as an interim step to developing an expanded corporate board, and Kenneth Francik was later appointed[5] to that

[5] His name had been inadvertently left off the ballot due to clerical error. As the general managing partner for the Partnership, Dr. Wagner appointed Francik to the new Partnership board.

Partnership board circa January, 2004. The corporate board of directors, however, remained unchanged, with Dr. and Mrs. Wagner remaining as the corporate board and officers of WBGI.

In September, 2004, Dr. Wagner and Mrs. Wagner, by way of Corporate Resolution in their capacity as the corporate officers of WBGI, appointed the members of the Partnership board to become an expanded corporate board [aka the Francik board] for a short duration [4 months] with the requirement that this new, expanded corporate board was to hold full elections by January 1, 2005, or the board would dissolve and governance revert to its original form [Dr. Wagner and Mrs. Wagner as the corporate board and officers].

The required elections were not held, the Francik board automatically dissolved, and governance reverted back to the original board [Dr.

Wagner and Mrs. Wagner] on January 1, 2005. Three months later, on April 1, 2005, Dr. Wagner and Mrs. Wagner appointed a new ten-person corporate board [aka the Tolman board] including Ron Tolman and others.

Notwithstanding the automatic dissolution of the short-duration Francik board by way of the Corporate Resolution that had appointed it, Francik and his board members failed to relinquish control of the corporate bank account, and continued to spend the corporate monies. Upon Dr. Wagner's attempts to obtain control of the corporate bank account, the bank account was frozen by the Bank of Hawaii, where the account had been maintained for a decade. To protect the WBGI employees, a "Two Boards Agreement" was signed by Kenneth Francik on behalf of the Francik

board and by Ron Tolman and WBGI's attorney[6] on behalf of the Tolman board precluding spending of the corporate funds on litigation of the governance dispute. The corporate records with the Secretary of State of Nevada, however, clearly reflected that the Tolman board was the proper corporate governance of WBGI.

Thereafter in the summer of 2005, with the approval of the Tolman Board, WBGI initiated two privately funded[7] legal actions via its attorneys; *WBGI v. Francik*[8] in Hawaii, seeking an order *Quo Warranto* excluding Francik from any further control of WBGI, and *WBGI v. Perkins* in Nevada seeking that Ms.

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[6] John Price, licensed only in Hawaii, who had served as WBGI's attorney for many years.

[7] Monies donated for that purpose, so that corporate funds were not used.

[8] WBGI's suit against Ken Francik, et al., entitled *WBGI v. Francik*, Civil No. 05-1-0163, Third Circuit Court, Hawaii, filed by WBGI's long-time Hawaii attorney Mr. John Price.

Perkins, who was also laying claim to control of WBGI, be excluded from any further control of WBGI.

The Nevada action was granted by the honorable Kenneth C. Cory of Clark County [Las Vegas], reaffirming that corporate governance was properly with the Tolman board, as reflected by the records of the Nevada Secretary of State. The Hawaii action was dismissed on a technicality [by the honorable Glenn S. Hara], with the Hawaii court declining to accept jurisdiction over the internal affairs of a corporation which has its articles of incorporation in Nevada, notwithstanding the existence of its business and corporate office in Hawaii, and all of its real estate and other assets likewise located in Hawaii.

After the Nevada action re-affirmed that the Tolman Board was the proper governing board of WBGI, and after the WBGI action in Hawaii against

Francik was dismissed on a jurisdictional issue, Francik and his board initiated the instant action in Nevada, fraudulently guising themselves as WBGI, notwithstanding their knowledge of the prior Nevada action confirming Ron Tolman and his board as the proper governance of WBGI, and spending the corporate funds [which they still controlled] to hire a Nevada attorney on their behalf, in fraudulent violation of that "Two Boards Agreement" precluding same.

Shortly after formation of the Partnership board [which replaced Dr. Wagner as the sole managing partner] in early 2004, Dr. Wagner approached Francik in June, 2004 with a request that Dr. Wagner be granted permission to sell some of his own shares in the botanical gardens. That request by Dr. Wagner for permission from the Partnership board chairman to sell his own shares was granted by

Francik as chairman of that board, and approved by four of the original six board members of that Partnership board. [It is to be noted that that is the same board that Francik and Mr. Story claim was the corporate board, notwithstanding the fact that Dr. Wagner and Mrs. Wagner constituted the corporate board at that time.]

Those four board members approving Dr. Wagner's personal share sales were Kenneth Francik, Dr. Walter L. Wagner, Mr. David Adams and Mr. Dan Perkins. Consequently, Dr. Wagner began selling some of his shares in the Partnership with board approval and board chairman approval [as well as with corporate board approval, which at that time consisted of only Dr. Wagner and Mrs. Wagner]. Dr. Wagner donated the great bulk of those proceeds to the botanical gardens.

At the time that Kenneth Francik and his attorneys filed the instant action, they included not only their fraudulent claims to governance of WBGI, but also their fraudulent claims that Dr. Wagner did not have permission to be selling his shares in the company, and that he was selling the treasury shares, not his own shares, and embezzling the money.

It is their fraudulent claim that he was selling the treasury shares, or selling his own shares without permission, that gave rise to their fraudulent monetary claims against Dr. Wagner and Mr. Perkins [who assisted Dr. Wagner in selling his shares]. Those claims were not presented at the trial, though after the trial they were presented against Dr. Wagner and Mr. Perkins and approved by the honorable Brent Adams as a monetary judgment against Dr. Wagner and Mr. Perkins. Those Partnership share sales were also erroneously held by the trial court to be a

contempt of court, even though the Preliminary injunction made no reference to sale of Partnership shares, whether owned by petitioner or otherwise.

## ARGUMENT

The Fifth Amendment of the US Constitution provides that

> *"No person shall be ... **deprived of life, liberty, or property, without due process of law** ...."* [***bold*** added for emphasis]

While the extent of the rights protected by substantive due process may be controversial, its theoretical basis is firmly established and forms the basis for much of modern constitutional case law. Passage of the Reconstruction Amendments (13th, 14th and 15th) gave the federal courts the authority to intervene when a state threatened fundamental rights of its citizens, and one of the most important

doctrines flowing from this is the application of the Bill of Rights to the states through the due process clause.

Through the process of "selective incorporation" most of the provisions of the first eight Amendments such as free speech, freedom of religion, and protection against unreasonable searches and seizures are applied against the states as they are against the federal government. The application of these rights against the states is no longer controversial.

The 5th Amendment applies to the federal government and its courts and agencies. The reference in the 14th Amendment extends protection of due process to all state governments, agencies, and courts.

Due process, in the context of the United States, refers to how and why laws are enforced. It applies to all persons, citizen or alien, as well as to corporations.

It is thus very apparent that the Petitioners' due process rights have been violated, and in particular Dr. Wagner's right to notice and an opportunity to be heard that he was to be considered to be a defendant at the Trial, instead of the notice actually given that he was to be merely a witness at the Trial. The notice that Dr. Wagner was given was that he was not a party to the trial, and that no monetary claims were being sought against him, and accordingly no attorney's fees would be sought against him. Dr. Wagner relied on that actual notice given, and the trial court not only erroneously issued monetary damages and attorney's fees against the

other parties, he also issued them against Dr. Wagner, who was not a party to the trial, in violation of his fundamental due process rights.

In addition, the failure to actually notify Mr. Perkins that he would be charged with contempt of court has desprived him of notice and an opportunity to be heard in violation of his due process rights; and the failure to notify him that monetary claims were being sought against him further deprived him of his due process rights.

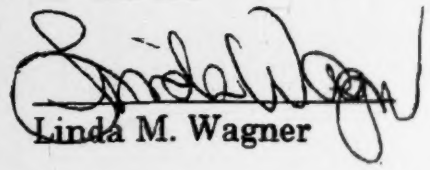
In addition, the failure to notify the other petitioners that monetary claims would be sought against them deprived them of their due process rights.

*Certiorari* must issue to determine how and why the gambling and prostitution state appears to

routinely and cavalierly deprive US citizens of their constitutional due process rights, particularly if parties elect to appear *pro se* before that state's Supreme Court.

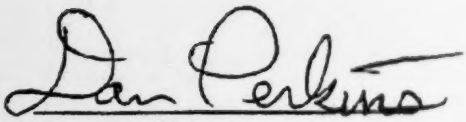
WHEREFORE, in light of the violations of Petitioner Dr. Wagner's due process rights guaranteed by the US Constitution to notice and an opportunity to be heard, in the light of the violations of Petitioner Mr. Perkins' due process rights to notice and an opportunity to be heard, and in light of the due process violations of the other petitioners, and other grievous errors of law and justice, it is respectfully requested that this Court grant this petition for issuance of a Writ of *Certiorari*.

DATED: April 12, 2008

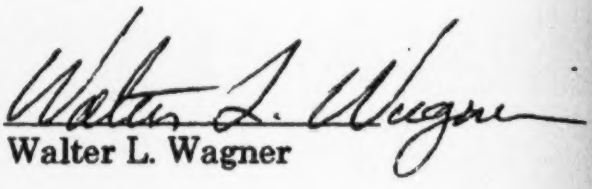


Linda M. Wagner

David Adams



Dan Perkins



Walter L. Wagner

## APPENDIX

NEVADA DISTRICT COURT ORDER AFFIRMING RONALD TOLMAN BOARD AS PROPER WBGI GOVERNANCE - - HONORABLE KENNETH C. CORY, JUDGE

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verbatim copy follows

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

***

WORLD BOTANICAL GARDENS, INC.
a Nevada Corporation,

Plaintiff,

Case No. A508735

Dept. No. 1

Civil Action

vs.

JOSEPHINE PERKINS,
an individual,

Defendants
_____/

**ORDER FOR DISMISSAL WITH PREJUDICE AND RETURN OF JURY FEES**

Based upon the stipulation of the parties to the above-entitled action, and the certified records of the Secretary of State of the State of Nevada attached hereto as **"Exhibit A"**, the Court finds that World Botanical Gardens, Inc. is incorporated in the State of Nevada, its designated officers are Walter L. Wagner, President, and Linda M. Wagner, Secretary/Treasurer, and its designated Board of Directors are Ronald Tolman, Chairman, Jacque Tolman, Walter L. Wagner, Linda M. Wagner, Dan Perkins, David Adams, Jim McBeth, Kim Harris, Doug Hansen, and Lanny Neel. The Court further

finds that Josephine Perkins is neither an officer nor a director of World Botanical Gardens, Inc. and, in accordance with the terms and conditions set forth in a settlement agreement between World Botanical Gardens, Inc. and Josephine Perkins, Ms. Perkins will forever cease and desist with falsely stating and misrepresenting to any third party that she is or was "acting Chairman" of WBGI, "Board Chairman of WBGI" and "President" of WBGI.

Now, therefore, good cause appearing, IT IS HEREBY ORDERED that the above-entitled action is dismissed with prejudice as against Defendant, JOSEPHINE PERKINS, with each party to bear their own court costs and attorney's fees. IT IS FURTHER ORDERED that the Clerk of the above-entitled Court be, and hereby is authorized and directed to pay the law firm of THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, the first day's jury fees

deposited on behalf of Plaintiffs in the above-entitled matter.

DATED this 8th day of September, 2005

[original signed by Kenneth C. Cory]
DISTRICT JUDGE

## NEVADA DISTRICT COURT TRIAL JUDGE BRENT ADAMS' 2006 ORDER REVERSING TRIAL JUDGE KENNETH CORY'S 2005 ORDER AS TO WBGI CORPORATE GOVERNANCE

---

verbatim copy follows

[*N.B.*: Walter Wagner, Ron Tolman, Jacque Tolman, Kim Harris and Jim McBeth had been dismissed as defendants prior to the issuance of the order, though named in the caption, and erroneously named in the body as to defendant Walter Wagner]

---

CODE: 1750

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WORLD BOTANICAL GARDENS, INC., a Nevada corporation

Plaintiff,

Case No. CV05-02079

vs.

Dept. No. 6

WALTER WAGNER, LINDA WAGNER, DAN PERKINS, DAVID ADAMS, RON TOLMAN, JACQUE TOLMAN, KIM HARRIS, DOUG HANSEN, JIM MCBETH, DOES I through X, and ROE ENTITIES I through X,

Defendants /

**FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER OF PERMANENT INJUNCTION, AND JUDGMENT**

On August 17, 18 and 21, this Court conducted a trial on the merits and a hearing on the Orders to Show Cause against Defendants Walter Wagner and Dan Perkins for violations of the Preliminary Injunction and the Permanent Injunction previously entered in this case. Robert W. Story and Robert S. Larsen of Story and Sertic appeared on behalf of Plaintiff World Botanical Gardens, Inc. ("WBGI"). Mark Robinson, Annette Emerson, Preston Michie, Ken Francik, and John Wallace testified for WBGI.

Treva J. Hearne of Hager and Hearne appeared on behalf of Defendants Walter Wagner, Linda Wagner, Dan Perkins, Doug Hansen, and Dave Adams. Defendants Walter Wagner, Dan Perkins, and Doug Hansen appeared and testified for Defendants.

After considering the testimony, evidence, and arguments of the parties in the trial on the merits, this Court now enters its Findings of Fact, Conclusions of Law, and Judgment as follows:

## FINDINGS OF FACT

1. WBGI is a Nevada corporation formed on April 21, 2001, and located in Honomu, Hawaii, doing business as a botanical garden.

2. As a Nevada corporation, WBGI is governed by a Board of Directors initially formed in December, 2002.

3. Since 2001, World Botanical Gardens, Inc., a Nevada corporation, is the only entity running

the business and holding the assets of the botanical garden.

4. The entity known as the World Botanical Gardens Joint Venture Partnership does not exist, owns nothing, controls nothing, is not a legal entity in any state or territory in the United States, and does not have any interest in WBGI.

5. On August 16, 2003, WBGI held its annual shareholders meeting, at Honomu, Hawaii. WBGI validly elected a Board of Directors, which designated newly elected Board Members Ken Francik as Chairman and Annette Emerson as Secretary-Treasurer.

6. In the latter part of 2003, Emerson and Francik spent numerous hours trying to decipher and organize WBGI's business records, which had formerly been kept by Defendant Walter Wagner. Emerson and Francik discovered that Defendant

Walter Wagner had diverted funds to his personal accounts, failed to keep proper financial records, and failed to pay employment taxes, failed to file corporate income tax reports, failed to keep accurate records of shareholders. Emerson and Francik also discovered the Internal Revenue Service had placed a lien on WBGI's real property to secure payment of overdue payroll taxes.

7. Upon discovery of Defendant Walter Wagner's malfeasance, the Board of Directors began to change Defendant Walter Wagner's role and limit his authority over daily affairs. On December 15, 2003, WBGI and Defendant Walter Wagner entered into an independent contractor agreement through which Defendant Walter Wagner remained the Garden Director with limited authority.

8. On May 15, 2004, WBGI terminated Defendant Walter Wagner's independent contractor agreement for cause.

9. On or about September 2, 2004, the Board of Directors by unanimous vote removed Defendant Walter Wagner as a member of WBGI's Board of Directors and precluded him from acting in any official capacity. On September 2, 2004, Francik notified Defendant Walter Wagner that the Board of Directors had removed him from WBGI's board.

10. On September 13, 2004, eleven days after the Board of Directors had removed him, Defendant Walter Wagner created a false set of "bylaws" and a false "corporate resolution". His unauthorized fictitious documents purportedly reinstated Defendant Walter Wagner and Defendant Linda Wagner as the sole officers of WBGI and were designed to place Defendants Walter Wagner and

Linda Wagner and their selected appointees onto WBGI's Board of Directors. Shortly thereafter, Defendant Walter Wagner filed false documents with the Secretary of State of the State of Nevada, Department of Corporations, falsely designating Defendant Walter Wagner and Defendant Linda Wagner as WBGI's officers, and placing themselves back on the Board of Directors.

11. On September 25, 2004, the WBGI shareholders elected the following Board of Directors: Ken Francik, Chairman and President; Preston Michie, Vice-Chairman and General Counsel; Annette Emerson, Secretary/Treasurer; Leslie Cobos; Mark Robinson; Don Miller and Gerhilde Uhl.

12. There has been no genuine dispute about the authority of the Board of Directors of WBGI to govern and run the business.

13. The dispute over control of WBGI has been nothing more that a relentless conspiracy and campaign by Defendant Walter Wagner and the other Remaining Defendants to gain control of WBGI at any cost.

14. Despite the results of the September 25, 2004, shareholder election, Defendants Walter Wagner, Dan Perkins, Linda Wagner, Doug Hansen, David Adams (collectively the "Remaining Defendants") and others thereafter conspired to interfere and interfered in WBGI's business affairs in the following ways:

a. The Remaining Defendants created a second, unauthorized board of directors, through which the Remaining Defendants and others have caused confusion among the shareholders of WBGI and through which the Remaining Defendants and others have attempted to wrest control of WBGI from



the authorized Board of Directors. Defendant Doug Hansen served as the Chairman of the second, unauthorized board of directors during a strategy meeting held on or about July 25, 2005.

b. The Remaining Defendants and others improperly and without authority scheduled an unauthorized annual meeting October 22, 2005 at 2:00 P.M. – the same day as the authorized annual election – to ratify the sale of real property owned by WBGI, and then postponed the unauthorized annual election to sometime in early 2006. This unauthorized annual meeting and postponement of this unauthorized annual election further caused confusion among the shareholders of WBGI.

c. The Remaining Defendants and others published newsletters which disputed the authority of the WBGI Board of Directors to hold an annual election on October 22, 2005, which falsely informed

the shareholders that the "authorized" annual election would be held in early 2006, and which falsely stated that their unauthorized Board of Directors was in control of WBGI.

15. The Remaining Defendants and others attempted to market and sell real property which belonged to WBGI.

16. The Remaining Defendants and others filed improper and unauthorized corporate documents with the Nevada Secretary of State, through which unauthorized corporate documents the Remaining Defendants and others claim to be the authorized directors and officers of WBGI.

17. The Remaining Defendants and others attempted to alter the signature cards of WBGI at the Bank of Hawaii, causing the Bank of Hawaii to freeze the WBGI account and to bounce WBGI checks, damaging WBGI in the amount of at least $884.00.

18. Defendant Walter Wagner, with the advice and consent of Defendant Doug Hansen, informed Network Solutions, the domain name registrar and the web-host of the WBGI website, <www.wbgi.com> that WBGI does not own the website and that ownership of the website is in litigation, twice causing the web-host to close the WBGI website. Closure of the website has caused WBGI to lose significant revenue from tourism and marketing opportunities. Defendant Walter Wagner and Defendant Doug Hansen caused, at a bare minimum, $11,853.06 in damages to WBGI through closure of the WBGI website through August 17, 2006. Neither Defendant Walter Wagner nor any other of the Remaining Defendants has any interest or ownership of the <www.wbgi.com> website. The Court finds that this calculation does not account for many hours of uncompensated labor contributed by

WBGI's Board members to deal with the behavior of the Remaining Defendants.

19. The Court finds specifically that the website <www.wbgi.com> is owned exclusively by WBGI under the direction of the Board of Directors.

20. The Remaining Defendants and others fraudulently obtained an order from the Eighth Judicial District Court of the State of Nevada, Case Number A508735, without notice to the WBGI Board of Directors and without authority of the WBGI Board of Directors through which Defendant Walter Wagner and others claim to be the authorized board of directors of WBGI.

21. The WBGI Board of Directors listed above has directed WBGI's business affairs from September 20, 2004, through October 22, 2005, when the shareholders elected a successor Board of Directors.

22. From Defendant Walter Wagner's removal through the present, the WBGI Board of Directors has properly managed the business and affairs of WBGI.

23. At every opportunity, Defendant Walter Wagner has attempted to paralyze and destroy WBGI – he has frozen the WBGI bank account; he has improperly and illegally recorded a lis pendens against the property of WBGI and its Garden Director, Dr. Lanny Neel; he has trespassed on WBGI property, where he sprayed weed-killer on Garden plants; he has taken over and/or closed WBGI's website, thereby destroying WBGI's internet marketing plan; and he's improperly sold interests in WBGI and pocketed the proceeds, thereby depriving WBGI of badly needed capital and defrauding investors.

24. The Remaining Defendants knew about all of these actions and ratified and/or participated in them as members of the unauthorized board of directors.

25. Transfer of any shares of WBGI stock requires approval of the Board of Directors.

26. Defendant Walter Wagner has failed to obtain or even request approval from the Board of Directors to transfer or sell any of his shares of WBGI stock.

27. Rather, Defendants Walter Wagner, Dan Perkins and Linda Wagner have intentionally and illegally engaged in a fraudulent scheme to sell shares of WBGI stock to unsuspecting purchasers.

28. Defendants Walter Wagner and Linda Wagner created their own false share certificates that were not authorized share certificates of WBGI.

29. Defendants Walter Wagner and Dan Perkins intended to conceal these fraudulent share sales from the Board of Directors.

30. These share sales were made with the knowledge and/or participation and/or consent of the Remaining Defendants.

31. Defendants Walter Wagner, Dan Perkins, and Linda Wagner have also sold shares in an entity known as the World Botanical Gardens Foundation, but which represented to potential purchasers as being shares of stock in WBGI.

32. The World Botanical Gardens Foundation is a dba for Defendant Walter Wagner. There is no evidence that it is or acts as a charitable entity. It is not a legal entity and there is no evidence of separate bank accounts or business records or any type of record that would justify its existence beyond a vehicle used by Defendants Walter Wagner and Dan

Perkins to perpetrate their fraudulent share transfers.

33. There is no evidence of mismanagement of WBGI by its Board of Directors. Rather, the actions of the Remaining Defendants have caused WBGI significant harm and financial damage.

34. Defendants Walter Wagner and Dan Perkins have refused to comply with this Court's Orders.

35. Defendant Walter Wagner and Defendant Dan Perkins lacked credibility and were generally not believable in their testimony.

36. Defendants Walter Wagner and Defendant Dan Perkins were unable to produce any evidence supporting their claims when requested by WBGI or this Court.

37. The Remaining Defendants have not complied with any Requests for Production which were served pre-trial in this case.

38. WBGI has placed a lis pendens on property owned by Defendant Walter Wagner which arises from a dispute over claims of embezzlement currently being litigated in Hawaii. Absent any evidence presented to the Hawaii court to support this lis pendens, WBGI is directed to remove such lis pendens from Defendant Walter Wagner's property.

The findings of fact from the Order of Contempt are hereby incorporated in these findings of fact.

## CONCLUSIONS OF LAW

1. The WBGI Board of Directors, as defined in the findings of fact, and now the successor Board of Directors has full control under NRS 78.120 of the affairs of WBGI.

2. The removal of Defendant Walter Wagner from the WBGI Board of Directors was proper; and the subsequent elections by WBGI shareholders validated Defendant Walter Wagner's removal from the WBGI Board of Directors.

3. The second, unauthorized board of directors created by the Remaining Defendants was not a proper board of directors and had no authority to act in any capacity on behalf of WBGI.

4. Any entity known as the World Botanical Gardens Joint Venture Partnership does not exist and has no legal authority to conduct any business of any nature.

5. Any entity known as the World Botanical Gardens Foundation does not exist and does not engage in charitable activities, but is merely a dba for Defendant Walter Wagner.

6. The conclusions of law from the Order of Contempt are hereby incorporated in these conclusions of law.

**ORDER OF PERMANENT INJUNCTION**

IT IS HEREBY ORDERED that Defendants Dan Perkins, Linda Wagner, Doug Hansen, and David Adams and their agents, servants, employees, affiliates, successors, assigns, and those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise are hereby permanently enjoined from the following actions:

(1) Participating in and/or creating an alternative board of directors for WBGI; informing shareholders of WBGI or anyone else that the WBGI Board of Directors is not authorized to call annual elections or conduct the affairs of WBGI; publishing any further newsletters, correspondence, any internet

site (including but not limited to the websites <www.wbgi.com>, <www.worldbotanicalgardensincorporated.com>, and www.worldbotanicalgardensfoundation.org, or publishing any other communication containing any information that disputes the authority of the WBGI Board of Directors to conduct the affairs of WBGI or disputes the authority of the WBGI Board of Directors to hold the annual elections. Defendants Dan Perkins, Linda Wagner, Doug Hansen, and David Adams are free, however, to participate in elections, as shareholders, to the extent of their ownership interest and to dispute the results of such election as provided by and in accordance with Nevada law;

(2) Interfering with WBGI's business affairs;

(3) Marketing or selling any real or personal property owned by WBGI;

(4) Filing any corporate documents with the Nevada Secretary of State concerning WBGI;

(5) Altering or attempting to alter the signature cards of WBGI at the Bank of Hawaii or otherwise interfering with the bank accounts or other financial affairs of WBGI;

(6) Using the order from the Eighth Judicial District Court of the State of Nevada to suggest that the WBGI Board of Directors is not the authorized Board of Directors of that Defendants Walter Wagner, Linda Wagner, Dan Perkins, Dave Adams, Doug Hansen and/or others are the authorized board of directors and/or offices of WBGI for any purpose;

(7) Informing the WBGI domain name registrar or web-host that WBGI does not own the <www.wbgi.com> website or from otherwise interfering with the WBGI web page;

(8) Using the name World Botanical Gardens or WBGI's trademarks, common law trademarks, or trade names, including any mark or name likely to cause confusion among investors, customers, or the public at large, or any representation that they are officers, directors, agents for, or otherwise in control of WBGI in any website, domain name, or email address owned, registered, or controlled by them, including but not limited to the websites <www.worldbotanicalgardensincorporated.com> and <www.worldbotanicalgardensfoundation.org> and the email address suffix of <wbgi.com>, or any similar website, domain name, or email address; and

(9) Selling, transferring, alienating or marketing, directly or indirectly, through any manner or means, any WBGI shares of stock or any interest in WBGI or World Botanical Gardens, including stock

owned by them or their designees without express written WBGI Board of Directors approval.

IT IS HEREBY FURTHER ORDERED that Defendants Dan Perkins, Linda Wagner, Doug Hansen, and David Adams are enjoined from instructing, aiding, or causing any other persons, firm, partnership, entity, or corporation to do anything this Order for Permanent Injunction prohibits them from doing.

The Court shall be notified by counsel within 24 hours of any violation of this Permanent Injunction, however slight.

**JUDGMENT**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants Walter Wagner and Doug Hansen are jointly and severally liable to WBGI in the amount of $12,737.06 together with post judgment interest at the legal rate for damages they caused

WBGI by freezing the WBGI bank account and closing the WBGI website.

DATED: October 2, 2006

Brent Adams
District Judge

NEVADA SUPREME COURT ORDER TO BE REVIEWED

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verbatim copy follows

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IN THE SUPREME COURT OF THE STATE OF NEVADA

WALTER L. WAGNER; LINDA M. WAGNER; DAN PERKINS; AND DAVID ADAMS,
Appellants,
vs.
WORLD BOTANICAL GARDENS, INC.,
Respondent

No. 48428

FILED

JAN 15 2008

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ORDER OF AFFIRMANCE

This is a proper person appeal from a district court permanent injunction and judgment in a business dispute. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Respondent World Botanical Gardens, Inc. is a Nevada corporation operating a botanical garden in Hawaii. Based on appellants' interference with World Botanical Gardens' business and governance, World

Botanical Gardens instituted the underlying action against them. In its amended complaint, World Botanical Gardens sought (1) a declaratory judgment identifying certain individuals – not including appellants –m as World Botanical Gardens' validly elected board of directors; (2) preliminary and permanent injunctions precluding appellants from further interfering with World Botanical Gardens' business; (3) an accounting of funds and assets intended for World Botanical Gardens that appellants had improperly obtained or redirected; and (4) a constructive trust for World Botanical Gardens' benefit, consisting of the funds and assets intended for World Botanical Gardens that appellants had obtained or redirected.

World Botanical Gardens ultimately obtained the relief that it sought through various district court orders. In particular, the district court issued a preliminary injunction precluding appellant Walter L. Wagner from interfering with World Botanical Gardens' business and governance. The district court then granted summary judgment to World Botanical Gardens with respect to its request for a judgment

declaring that certain individuals constituted World Botanical Gardens' valid and controlling board of directors. Next, the district court issued a permanent injunction precluding Walter Wagner from interfering with World Botanical Gardens' business and governance. Thereafter, the district court issued a permanent injunction prohibiting appellants Linda Wagner, Dan Perkins, and David Adams from interfering with World Botanical Gardens' business and governance. The permanent injunction order also included a $12,737.06 judgment jointly and severally against Walter Wagner and a defendant who is not a party to this appeal, based on Walter Wagner's and the defendant's interference with a World Botanical Gardens' bank account and website.

The district court subsequently entered an order awarding $7,058.36 in costs and $75,000 in attorney fees to World Botanical Gardens. Ultimately, the court entered an order determining that Walter Wagner and Dan Perkins were in contempt of its injunctions and imposing a constructive trust in World Botanical Gardens' favor, consisting of $351,520 obtained by Walter Wagner

and Perkins, but intended for World Botanical Gardens. Walter Wagner, Linda Wagner, Dan Perkins, and David Adams have appealed.

In considering this appeal, questions of law are reviewed de novo.[9] But we give deference to the district court's factual findings so long as they are not clearly wrong and are supported by substantial evidence,[10] which has been defined as evidence that "a reasonable mind might accept as adequate to support a conclusion."[11] Moreover, witness credibility determinations are within the district court's fact-finding purview, and we thus will not substitute our or appellants' view of witness testimony for that of the district court.[12]

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[9] SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993)

[10] See NOLM, LLC v. County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004); Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994)

[11] First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (internal quotation marks omitted).

[12] Fox v. First Western Sav. & Loan, 86 Nev. 469, 472, 470 P.2d 424, 426 (1970)

The district court's decisions with respect to injunctive relief, costs and attorney fees, and contempt are generally reviewed for an abuse of discretion.[13] And although we likewise generally review a district court's decision with respect to issuing a declaratory judgment for an abuse of

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[13] See Labor Comm'r v. Littlefield, 123 Nev. __, __, 153 P.3d 26, 28 (2007) (noting that the decision to grant a preliminary injunction is within the district court's discretion); Kohn v. Morse & Mowbray, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005) (noting that "[t]he decision to award attorney fees is within the [district court's] sound discretion ... and will not be overturned absent a 'manifest abuse of discretion'" (quoting County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982))); Matter of Water Rights of Humboldt River, 118 Nev. 901, 903, 59 P.3d 1226, 1227 (2002) (noting that contempt orders are reviewed for an abuse of discretion); Bobby Berosini Ltd. v. PETA, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) (noting that the determination of allowable costs is within the district court's sound discretion); A.L.M.N., Inc. v. Rosoff, 104 Nev. 274, 277, 757 P.2d 1319, 1321 (1988) (recognizing that the district court's decision to grant a permanent injunction is generally reviewed for an abuse of discretion); Schouweiler v. Yancey Co., 101 Nev. 827, 833, 712 P.2d 786, 790 (1985) (noting that the district court has discretion to award attorney fees based on a rejected offer of judgment).

discretion,[14] because the declaratory judgment in this case was issued in context of an order granting a motion for partial summary judgment, we conclude that the proper standard of review is that for summary judgment, de novo.[15] With respect to the district court's decision to impose a constructive trust, a constructive trust is an equitable remedy,[16] which is

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[14] County of Clark v. Upchurch, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998) (recognizing that a district court's determination with respect to issuing a declaratory judgment is reviewed for an abuse of discretion.)

[15] See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (noting that this court reviews orders granting summary judgment de novo); cf. A.L.M.N., Inc., 104 Nev. at 277, 757 P.2d at 1321 (reviewing de novo a district court's decision to issue a permanent injunction because it issued the permanent injunction in conjunction with granting a motion for summary judgment).

[16] See Danning v. Lum's, Inc., 86 Nev. 868, 871, 478 P.2d 166, 167 (1970) (recognizing that a constructive trust is a remedial device by which the holder of legal title to property is designated a trustee for the benefit of another, who in good conscience is entitled to it.)

within the district court's discretion to impose.[17]

Having reviewed the record, appellants' appeal statements, respondent's response, and appellants' joint reply thereto[18] in light of those principles, we conclude that the district court's determinations are neither an abuse of its discretion nor erroneous. Indeed, substantial record evidence supports the district court's judgment.

Accordingly, we

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[17] See Hames v. Frank, 579 N.E.2d 1348, 1355 (Ind. Ct. App. 1991) (noting that "[t]he trial court has full discretion to fashion equitable remedies that are complete and fair to all parties involved"), cited in Bedore v. Familian, 122 Nev. 5, 12 n.21, 125 P.3d 1168, 1172 n.21 (2006).

[18] Although appellants did not separately request leave to submit a reply brief, as we have considered their reply brief on August 29, 2007, we deny World Botanical Gardens' December 13, 2007 motion to strike it.

Further, to the extent that World Botanical Gardens' December 13 motion to strike appellants' response requests to supplement its response with an order from an action involving Walter Wagner and World Botanical Gardens in the Circuit Court of Hawaii, that request is denied.

ORDER the judgment of the district court AFFIRMED.[19]

(signed)
Hardesty

(signed)
Parraguirre

(signed)
Douglas

cc: Hon. Brent T. Adams, District Judge
David Adams
Dan Perkins
Linda M. Wagner
Walter L. Wagner
Story Law Group
Washoe District Court Clerk

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[19] On November 29, 2007, Walter Wagner filed a letter essentially requesting that we determine the propriety of a document that World Botanical Gardens purportedly filed in the district court, notifying the district court of Walter Wagner's alleged violations of the permanent injunction. That issue, however, is not properly raised in the context of this appeal. Accordingly, we deny any request for relief contained in Walter Wagner's November 29 letter.

Having considered all of the issues raised by appellants, we conclude that their other contentions lack merit and thus do not warrant reversal of the district court's judgment.

HAWAII COUNSEL ADVISING PETITIONERS WERE WBGI GOVERNANCE

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verbatim copy follows

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John H. Price
Attorney at Law, A Law Corporation
Suite 1070 Pioneer Plaza
900 Fort Street Mall
Honolulu, Hawaii 96783

March 24, 2005

Dr. Walter Wagner
World Botanical Gardens, Inc.
PO Box 881
Pepeekeo, HI 96783

Dear Dr. Wagner

Thank you for your letter of March 17, 2005 in which you requested me to review various corporate documents and provide my opinion as to the appointment of the 2005 Interim Board of Directors of World Botanical Gardens, Inc. For the reasons set forth below it is my opinion that the March 14, 2005 Corporate Resolution establishing the 2005 Interim Board of Directors is authorized by and in accordance

with the corporation's bylaws and statutes governing the corporation.

I have reviewed the following in preparation of this opinion:

1. Corporate Resolution dated March 14, 2005 (2005 interim board of directors);

2. Corporate Resolution dated September 13, 2004 (board of directors and bylaws);

3. Other sample corporate resolutions as examples of format;

4. Internal document for corporate file dated April 13, 2001 establishing the original Board of Directors;

5. Corporate information of World Botanical Gardens, Inc. from the Nevada Secretary of State website;

6. Acceptance to board form for 2005 Interim Directors;

7. Nevada Revised Statutes 78.115, 78.120, 78.130, 78.135, 78.138 and 78.139

A review of these documents reveals the following information>

You are the incorporator of World Botanical Gardens, Inc. You and Linda M. Wagner constituted the original Board of Directors at the time of incorporation in 2001 until the adoption of bylaws or another board was appointed by officers of the corporation. You and Linda M. Wagner are officers of the corporation.

By enactment of the corporate resolution dated September 13, 2004, an interim Board of Directors replaced you and Linda M. Wagner. The resolution also established bylaws governing, among other things, the election of a Board of Directors. The bylaws required the interim board to hold an election to establish a replacement Board of Directors by the end of 2004. The bylaws further provided that if at least seven board members were not elected then the Board of Directors automatically dissolved at the end of 2004 and the governance of the corporation would revert to its previous form, i.e. you and Linda M. Wagner holding the offices of the corporation.

I understand from our conversation that the interim Board of Directors did not hold the election required by the bylaws, and thus, by automatic operation of the bylaws the interim board dissolved effective January 1, 2005. That made you and Linda M. Wagner the directors of the corporation once again.

Nevada Revised Statute 78.130 provides that any vacancy in an office of the corporation must be filled as provided in the bylaws, or in the absence of such a provision in the bylaws, by the Board of Directors. Upon dissolution of the interim board, you and Linda M. Wagner as the Board of Directors have the authority to fill the vacancies, i.e. appoint a new Board of Directors.

Based upon the foregoing, it is my opinion that the March 14, 2005 corporate resolution was a proper exercise of the powers of the Board of Directors under the Nevada corporate statutes and the bylaws of the corporation.

If you have any questions or if I can be of further assistance please do not hesitate to contact me. Thank you for the opportunity to provide service to World Botanical Gardens, Inc. outside the context of a personal injury lawsuit.

Yours very truly,

(signed)
JOHN H PRICE

## FOURTEENTH AMENDMENT

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.